S. NIRMALA MUTHIAH SELVARAJAH, RE: EX P;
THE NEW STRAITS TIMES PRESS (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[BANKRUPTCY NO. 43-2964-85]
26 SEPTEMBER 1986

CIVIL PROCEDURE: *Application for substituted service of bankruptcy notice - Requirements to be met - Practice Note No. 1 of 1968 - Rules of the High Court 1980 - Order 62 r. 5.*

The question that arose in this appeal from the Senior Assistant's Registrar's refusal to make an order for substituted service of a bankruptcy notice on the grounds that the requirements of **Practice Note No. 1 of 1968** had not been met was the extent of the applicability of the Practice Note with particular reference as to whether the requirements of the Practice Note had to be adhered to before an application for substituted service could be made where the whereabouts of the person to be served was unknown.

Order 62 r. 5 of the Rules of the High Court deals with substituted service of process:

If the address of the defendant's residence and business address is not known the call obviously cannot be made there. It follows that Practice Note No. 1 of 1968 has no application where neither the permanent (or temporary) residential address nor the business address of the defendant is known.

Held:
[1] Practice Note No. 1 of 1968 has no application in this case. The Appeal and Application for substituted service is allowed. The Bankruptcy Notice may be served by substituted service by posting copies thereof together with a copy of the order made hereby on the notice board of the Court and by advertisement in one issue of the New Straits Times and Tamil Nesan. That such posting and advertisement be deemed good and sufficient service on the judgment debtor of the Bankruptcy Notice seven days after such posting and advertisement.

[2] The time limit for the service of the Bankruptcy Notice is extended up to 31 December 1986.

[Appeal allowed.]

Cases referred to:
Deverall v. Grant Advertising [1955] Ch 111
Porter v. Freudenberg [1915] 1 KB 857

Legislation referred to:
Rules of the High Court 1980, O. 62 rr. 5, 5(1), (3)

Other sources referred to:
White Book 1957, p. 88
Mallal's Supreme Court Practice, Note No. 1 of 1968

For the petitioner/appellant - S. Sothi, Syarikat S. Sothi

JUDGMENT

VC George J:

The question that arose in this appeal from the Senior Assistant Registrar's refusal to make an order for substituted service of a bankruptcy notice on the grounds that the requirements of Practice Note No. 1 of 1968 had not been met was the extent of the applicability of the Practice Note with particular reference as to whether the requirements of the Practice Note had to be adhered to before an application for substituted service could be made where the whereabouts of the person to be served was unknown.

Order 62 r. 5 of the Rules of the High Court deals with substituted service of process and sub-rule (1) thereto provides that the Court may make an order for substituted service of a document "if it appears to the court that it is impracticable for any reason to serve that document personally".

In England the provisions for substituted service are similar to ours and it was in connection with the need to satisfy the Court that it was impracticable to serve the document that the learned authors of the Supreme Court Practice had recommended certain guidelines for practitioners, which guidelines can be found at p. 88 of the 1957 White Book. Practice Note No. 1 of 1968 is a reproduction of those very guidelines. The basis for the guidelines (and for the Practice Note) is that a mere statement that the person to be served was evading service was not sufficient to meet the requirement of satisfying the Court that it was impracticable to serve the document. The last paragraph of the Practice Note states that "Compliance with the above practice will ensure that the application for substituted service will be grounded on other than a mere statement that the defendant is evading service. Such statement should never be sufficient to apply for an order for substituted service..." The phrase "Compliance ... will ensure" has the effect that the Practice Note does not prohibit other procedures that may bring about the same result.

Now, the Practice Note recommends certain steps to be taken before the application for substituted service is made.

Item 1 of the Note provides for two calls to be made.

Item 2 is as follows:

> The calls should be made at the defendant's residence, permanent or temporary, if known; otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelope addressed to the defendant.

Item 5 is as follows:

> The second call should be made by appointment by letter sent to the defendant by ordinary prepaid letter post, giving not less than two clear days' notice, enclosing a copy of the document to be served, and offering an opportunity of making a different appointment.

The true effect of the first sentence in item 2 is all important in considering the questions now before the Court. The calls should only be made at the defendant's residence if such address (it does not matter whether it is the permanent address or only a temporary address) is known. If the address of the defendant's residence is not known the call obviously cannot be made there but may be made at his business address. It is equally obvious that such a call at the business address cannot be made if that address is not known. The note goes on

to provide that even if the residential address of the defendant is known the call may be made at his business address (if that is also known) but only if the claim relates to the defendant's business.

It follows that Practice Note No. 1 of 1968 has no application where neither the permanent (or temporary) residential address nor the business address of the defendant is known. In that event the calls cannot be made. It follows that I have to agree with the submission of Encik S. Sothi of Counsel for the appellant that where the whereabouts of the person to be served is not known Practice Note No. 1 of 1968 has no application.

Another question that arises is whether the last known address of the person to be served can be utilised to implement the procedures recommended by the Practice Note. The answer to the question has to be in the negative if the information available is that the last known address of the person to be served has ceased to be his address.

Sub-rule (3) of O. 62 r. 5 provides that

> Substituted Service of a document in relation to which an order is made under this rule is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

The learned author of *Mallal's Supreme Court Practice* 2nd Edn. at 62/5/2 quotes Romer LJ in *Deverall v. Grant Advertising* [1955] Ch 111:

> The intention which underlines all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings.

Sub-rule (3) provides the principle that should guide practitioners and registrars in respect of applications for substituted service where the whereabouts of the persons to be served is not known. No specific guidelines such as is provided by Practice Note No. 1 of 1968 have been laid down for cases where the whereabouts of the person to be served is not known. However, again a mere statement that the whereabouts of the person to be served is not known will not be sufficient for the order for substituted service to be made. The registrars concerned would no doubt be assisted if the circumstances that lead to the party wanting to have service of the document effected not knowing the whereabouts of the person to be served is explained by affidavit in which affidavit suggestions could be made as to the method of substituted service that should be ordered "which in all reasonable probability, if not certainty, will be effective to bring knowledge of the writ ... to the defendant" *Porter v. Freudenberg* [1915] 1 KB 857. The affidavit should condescend to particulars sufficient to satisfy the registrar that the application is made *bona fide* and that the method of substituted service will meet the objectives of sub-rule 3 to O. 62 r. 5. Such particulars could include the knowledge or belief (with reasons for having such knowledge or belief) that the person to be served is within or outside the jurisdiction of the Court.

For ease of reference I would summarize the position as follows:

1.1 - Where the whereabouts of the person to be served is known compliance of Practice Note No. 1 of 1968 will ensure that the application for substituted service is grounded on other than a mere statement that the person to be served is evading service.

1.2 - The Practice Note does not have the effect of prohibiting other procedures that bring about the same result.

2.1 - Where the whereabouts of the person to be served is not known the Practice Note has no application in respect of an application for substituted service.

2.2 - However, again it is not sufficient that the application for substituted service is grounded on a mere statement that the person to be served is evading service.

2.3 - The affidavit in support of the application must set out:

2.3.1 - facts that demonstrate the *bona fides* of the application which could be by a statement of the circumstances that had resulted in the whereabouts of the person to be served not being known.

2.3.2 - the belief and the reason for such belief that the person to be served is within or outside the jurisdiction of the Court.

2.3.3 - proposals for the manner in which the substituted service is to be effected having in mind that the intention is that the person to be served will thereby probably get to hear of the proceedings.

In the instant case the affidavits read in support of the application show that enquiries made at the last known address has resulted in the belief that the defendant had ceased to reside or carry on business there and that her whereabouts are not known. The affidavits show that the defendant is a Malaysian citizen. Her name suggests that she is a Tamil. There was no reason to suggest that she is out of the jurisdiction.

Clearly Practice Note No. 1 of 1968 has no application in this case. The appeal is allowed. The application for substituted service is allowed. The Bankruptcy Notice may be served by substituted service by posting copies thereof together with a copy of the order made hereby on the notice board of the Court and by advertisement in one issue of the New Straits Times and, the debtor being a Tamil, in one issue of the Tamil Nesan as well and that such posting and advertisement be deemed good and sufficient service on the judgment debtor of the Bankruptcy Notice seven days after such posting and advertisement. The time limited for the service of the Bankruptcy Notice is extended up to 31 December 1986.

Also found at [1987] 1 CLJ 413